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In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT J. KOWALSKI AND NANCY A. KOWALSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. A 1A–37A) are reported at 65 T.C. 44. The opinion of the court of appeals (Pet. App. B 38A–41A) is reported at 544 F. 2d 686.

JURISDICTION

The judgment of the court of appeals (Pet. App. C. 42A) was entered on November 11, 1976. The petition for a writ of certiorari was filed on February 7, 1977, and was granted on March 28, 1977 (A. 41). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether cash payments to state police troopers, designated as meal allowances, are includable in their gross income under Section 61(a) of the Internal Revenue Code of 1954, and are not otherwise excludable from income under Section 119 of the Code, which excludes from an employee's gross income the value of meals furnished to him by his employer for the convenience of the employer but only if the meals are furnished on the employer's business premises.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of Sections 61(a) and 119 of the Internal Revnue Code of 1954 (26 U.S.C.) and of Treasury Regulations, Section 1.119–1 (26 C.F.R.), are set forth in the Appendix, *infra,* pp. 1A–5A.

STATEMENT

1. Respondent [1] is a state police trooper employed by the Division of State Police of the Department of Law and Public Safety of the State of New Jersey. During 1970, he received a base salary of $8,739.38, and an additional $1,697.54, designated as an allowance for meals.[2] All New Jersey State Police Troopers are entitled to the same meal allowance regardless

[1] References to "respondent" are to Robert J. Kowalski. Nancy A. Kowalski is a party solely because she filed a joint return with her husband for the year at issue.

[2] Although respondent was entitled to $1,740 in meal allowance money, he in fact received $1,697.54. The discrepancy is not relevant (Pet. App. A 4A, n. 2).

of their length of service (Pet. App. A 2A, 4A, and n. 2, 5A, 7A–8A).

The meal allowance is paid biweekly in advance and is included in the trooper's salary, which is paid for prior periods. The cash allowance for meals is described on a state police recruitment brochure as an item to be received in addition to base salary. The amount of the meal allowance is a subject of negotiations between the State and the police troopers' union (Pet. App. A 4A–5A).

During 1970, the year in question, the amount of the cash meal allowance varied in accordance with the rank of the police officials. Thus, for example, the allowance for troopers, such as respondent, and other non-commissioned officers, was $1,740 per year. However, lieutenants and captains received $1,776; majors received $1,848; and the superintendent received $2,136 (Stip. par. 24, A. 24).

The State of New Jersey instituted the cash meal allowance for its police troopers in July, 1949,[3] Prior to that time, all troopers were provided with actual meals during active duty hours. The meals were served at various meal stations throughout the State. When a trooper was unable to eat at an official meal station, he would eat at a public restaurant and obtain reimbursement from the State (Pet. App. A 3A–4A).

[3] The meal allowance for troopers was originally set in 1949 at $70 per month (Pet. App. A 4A).

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The meal station system proved to be unsatisfactory because the troopers spent too much time in traveling from their duty posts to the nearest meal station and thereby left their posts unguarded. As a result, the State closed its meal stations and established a cash allowance system, in accordance with the practice adopted by several neighboring states (Pet. App. A 4A).

Under the cash meal allowance system, troopers are expected to eat within their assigned patrol area. They must first check in with the officer in charge of their assignment station and request permission to eat. Troopers are subject to call during their meal period. Thus, a trooper must advise the officer in charge where he may be reached while eating (Pet. App. A 5A).

The state places no restrictions on the use of the cash meal allowances provided to the police troopers. They are not required to account to the State for their meal expenses. A trooper may eat at home if he lives within his assigned duty area, eat in a public restaurant, or bring his own meal and eat in or near his patrol car. The amount of the meal allowance is not calculated to provide reimbursement for any specific number of meals (Pet. App. A 5A).

On his 1970 income tax return, respondent reported $9,066 in wages. That amount included his base salary of $8,739.38 and cash meal allowances of $326.45. The state included the latter amount on respondent's Wage and Tax Statement (Form W–2) for the year. However, respondent did not report as

income on his 1970 return the remaining $1,371.09 portion of his meal allowance [4] that was not included on his Form W–2. Respondent also claimed $405 of food maintenance expenses as a miscellaneous itemized deduction (Pet. App. A 7A–8A).

On audit, the Commissioner of Internal Revenue disallowed respondent's claimed deduction for food maintenance expenses. Subsequently, the Commissioner discovered that respondent had not reported as income the remaining $1,371.09 of cash meal allowances that was not included on his Form W–2. The Commissioner thereupon determined that such amount was properly includable in respondent's gross income and accordingly increased the deficiency (Pet. App. A 8A).[5]

2. In a reviewed decision, the Tax Court held, with six dissents,[6] that the cash meal payments were in-

[4] The State began to withhold income tax from the cash meal allowances paid to the troopers as of October 1, 1970. Hence, only $326.45 of the total $1,697.54 was reported on respondent's 1970 Wage and Tax Statement (Pet. App. A 7A, n. 3).

[5] The Commissioner raised the issue of includability of the cash meal allowances by amending his answer in the Tax Court (Pet. App. A 8A; A. 15–17). See Section 6214(a) of the Internal Revenue Code of 1954.

[6] Judge Sterrett, joined by five other judges, dissented on the ground that the cash payments were not income under Section 61 (Pet. App. A 32A–37A). In addition, Judge Drennen dissented (Pet. App. A 28A–32A) only with respect to the majority's conclusion (Pet. App. A 24A–28A) that the cost of respondent's meals was deductible as travel expenses under Section 162(a)(2) only to the extent that they were eaten while away from home overnight. See *United States* v. *Correll*, 389 U.S. 299. The propriety of that deduction is not at issue. See n. 7, *infra*.

cludable in respondent's gross income under Section 61(a) of the Internal Revenue Code of 1954 (Pet. App. A 8A–19A). In so ruling, the court relied upon the broad statutory definition of "gross income" in Section 61(a), which provides that "[e]xcept as otherwise provided, * * * gross income means all income from whatever source derived * * *." In the Tax Court's view, its conclusion followed from the decisions of this Court holding that by broadly defining gross income, Congress intended to "tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430 (Pet. App. A 12A). Although the Tax Court found that the State did not intend the meal allowances to represent additional compensation (Pet. App. A 5A), it concluded that the payment "was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source" (Pet. App. A 13A).

Moreover, the Tax Court unanimously held that the cash payments did not qualify for the exclusion from gross income under Section 119 of the Code (Pet. App. A 19A–24A). That statute provides for an exclusion from gross income for the value of any meals furnished to an employee by his employer for the convenience of the employer, but only if the meals are furnished on the business premises of the employer. In the Tax Court's view, the meal allowances were not excludable under Section 119 because they were cash payments and not meals furnished in kind. It therefore found it unnecessary to consider whether

the payments met the other prerequisites of Section 119 (Pet. App. A 19A).[7]

The court of appeals reversed *per curiam* (Pet. App. B 38A–41A). In holding that the cash meal allowances were not includable in the statutory definition of gross income, the court adhered to its prior decision in *Saunders* v. *Commissioner*, 215 F. 2d 768, reversing 21 T.C. 630, in which it ruled in favor of the New Jersey State troopers with respect to the same cash payments. The court further held that the payments were excludable from income under Section 119, stating: "We * * * align ourselves with the Fifth, Eighth, and Tenth Circuits" (Pet. App. B 41A).[8]

SUMMARY OF ARGUMENT

I

Section 61(a) of the Internal Revenue Code of 1954 states that "[e]xcept as otherwise provided * * *, gross income means all income from whatever source derived * * *." As this Court has repeatedly observed

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[7] The Tax Court also held that respondent could deduct two-thirds of the meal allowance as a business expense because he was "away from home" within the meaning of Section 162(a)(2) of the Code (Pet. App. A 24A–26A). The Commissioner did not appeal that aspect of the Tax Court's decision and it is no longer at issue.

[8] See, *e.g.*, *United States* v. *Barrett*, 321 F. 2d 911 (C.A. 5); *United States* v. *Morelan*, 356 F. 2d 199 (C.A. 8); and *United States* v. *Keeton*, 383 F. 2d 429 (C.A. 10). See also *Smith* v. *United States*, 543 F. 2d 1155 (C.A. 5), petition for a writ of certiorari pending, No. 76–1243. Contra: *Wilson* v. *United States*, 412 F. 2d 694 (C.A. 1); *Koerner* v. *United States*, 550 F. 2d 1362 (C.A. 4), petition for a writ of certiorari pending, No. 76–1539.

with respect to its comparable statutory predecessors, this language was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U.S. 331, 334. The broad catch-all phrase "from whatever source derived" shows that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as their nature." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429–430. Thus, the Court has consistently recognized that it was "the intention of Congress to tax all gains except those specifically exempted" (*id.* at 430).

Under these principles, the unrestricted cash payments to respondent and his fellow New Jersey State Police Troopers to defray the cost of their personal meal expenses fall within the broad reach of the statutory definition of "gross income." The troopers were not required to expend the payments for meals, but could use the money as they saw fit. The payments were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co.*, *supra*, 348 U.S. at 431.

In ruling that the cash payments at issue were not includable in respondent's gross income, the court of appeals adhered to its prior pre-1954 Code decision in *Saunders* v. *Commissioner*, 215 F. 2d 768 (C.A. 3), involving the same New Jersey police troopers. But *Saunders* was decided prior to this Court's holding in *Glenshaw Glass Co.* Moreover, *Saunders* rests upon an erroneous analogy to military subsistence allowances, which Congress has long recognized to be exempt from tax. Finally, the "convenience-of-the-employer" rationale, upon which *Saunders* rests, is now confined exclusively to Section 119, which was added at the time of the 1954 codification. *Saunders* therefore is no longer a viable precedent under the 1954 Code. Therefore, cash payments that are not excludable under Section 119 cannot escape taxation on the ground that they are not gross income under Section 61(a).

At all events, even if there is a non-statutory "convenience-of-the-employer" rule that survives the enactment of the 1954 Code, the cash payments at issue would not qualify for exclusion under such a rule because they were not made for the convenience of the employer and were compensatory.

II

The court of appeals' holding that the cash payments designated as meal allowances are excludable under Section 119 is equally erroneous. That provision permits the exclusion from an employee's gross income of "the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer * * *." The use of the terms "value" and "furnished" shows that the statute requires meals to be furnished in kind.

The pertinent legislative history reinforces that conclusion. The Senate Finance Committee Report stated (S. Rep. No. 1622, 83d Cong., 2d Sess. 190–191

(1954)): "Section 119 applies only to meals or lodging furnished in kind. Therefore, any cash allowances for meals or lodging received by an employee will continue to be includible in gross income to the extent that such allowances constitute compensation." Accord: Treasury Regulations, Section 1.119–1(c)(2).

In light of the statutory language and the legislative history, the cash allowances at issue here cannot qualify for exclusion under Section 119. First, the cash payments did not serve the convenience of the employer because they were unrelated to any restrictions that would enhance police protection. Second, cash payments are not, under any stretch of the imagination, meals furnished in kind, and the four courts of appeals that have so held are in error.

Finally, since the troopers consumed these meals in various public restaurants, the statutory requirement that the meals be furnished on the business premises of the employer was not met. See *Dole* v. *Commissioner*, 43 T.C. 697, 707–709 (Raum, J., concurring), affirmed *per curiam*, 351 F. 2d 308 (C.A. 1); *Commissioner* v. *Anderson*, 371 F. 2d 59 (C.A. 6); certiorari denied, 387 U.S. 906. As the First Circuit observed in *Wilson* v. *United States*, 412 F. 2d 694, 697, in holding that such payments were neither meals in kind nor furnished on the employer's business premises, "[t]hus we have a case where history, sense and language all coincide." Accord: *Koerner* v. *United States*, 550 F. 2d 1362 (C.A. 4), petition for a writ of certiorari pending, No. 76–1539.

ARGUMENT

I

AN EMPLOYER'S CASH PAYMENTS TO HIS EMPLOYEES TO DEFRAY THE COST OF THEIR PERSONAL EXPENSES FOR MEALS ARE INCLUDABLE IN THE EMPLOYEES' GROSS INCOME UNDER SECTION 61(a) OF THE INTERNAL REVENUE CODE

A. THE LANGUAGE OF SECTION 61(a) AND THE DECISIONS OF THIS COURT ESTABLISH THAT GROSS INCOME INCLUDES ALL RECEIPTS FROM WHATEVER SOURCE UNLESS SPECIFICALLY EXEMPTED BY STATUTE

This federal income tax case involves the scope of the fundamental statutory concept of gross income. Section 61(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 1A) provides that "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, and similar items * * *." As this Court has repeatedly observed with respect to its comparable statutory predecessors, this language was used by Congress to exert "the full measure of its taxing power." *Helvering* v. *Clifford*, 309 U.S. 331, 334; *Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U.S. 216, 223; *Douglas* v. *Willcuts*, 296 U.S. 1, 9; *Irwin* v. *Gavit*, 268 U.S. 161, 166.

Thus, for example, in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, the Court ruled that money received as exemplary damages for fraud or as the

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punitive two-thirds portion of a treble-damage antitrust recovery must be included in the recipient's "gross income." In so holding, the Court relied upon the presence in the statute of the broad catch-all phrase "from whatever source derived" as proof that "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature" (348 U.S. at 429–430). Given the broad phraseology of the statute, which dates from the very beginnings of the modern income tax (see Section II(B), Revenue Act of 1913, 38 Stat. 114, 167), the Court has consistently recognized that it was "the intention of Congress to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co., supra,* 348 U.S. at 430. See also *Commissioner* v. *LoBue,* 351 U.S. 243, 246; *Commissioner* v. *Jacobson,* 336 U.S. 28, 49; *Helvering* v. *Stockholms Enskilda Bank,* 293 U.S. 84, 87–91.

The foregoing principles apply with equal force to this case. Here, the State of New Jersey makes cash payments of $1,740 per year to its police troopers that are in addition to their salary and designated as meal allowances. The State places no restrictions on the use of the cash meal allowances provided to the troopers. They are not even required to use the allowances for meals. A trooper may eat at home if he lives within his assigned duty area, eat in a public restaurant, or bring his own meal and eat in his patrol car. The amount of the meal allowance is not calculated to reimburse a trooper for any specific number of meals (Pet. App. A 5A).

The unrestricted cash payments to the state police troopers by their employer fall within the broad reach of the statutory definition of "gross income." In the words of this Court, the payments were "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra,* 348 U.S. at 431.

In holding that the cash payments to respondent to defray the cost of his personal meal expenses were not includable in his gross income, the court of appeals adhered to its prior decision in *Saunders* v. *Commissioner,* 215 F. 2d 768, involving the same cash meal allowance to the New Jersey police troopers under the 1939 Code. But as the Tax Court majority correctly recognized (Pet. App. A 10A–11A), *Saunders* was decided prior to this Court's holdings in *Glenshaw Glass Co.* and *LoBue* and cannot stand in the light of this Court's broad construction of gross income as all receipts except those specifically exempted. Indeed, the prefatory language of Section 61 (a)—"Except as otherwise provided in this subtitle"—confirms that Congress intended that all items of income be included within the statutory definition of gross income unless they fit within one of the "items specifically excluded from gross income" set forth in Part III of Subtitle A of the Code (Sections 101–124).

Moreover, even apart from this Court's rulings with respect to the definition of "gross income," *Saunders* rests upon an erroneous extension of the pre-1954 Code "convenience-of-the-employer" rule to

cash payments (see *infra,* pp. 14–20). However, that rule, was preempted by Section 119 of the 1954 Code, which restricts the tax exclusion to those meals furnished in kind on the business premises of the employer. Thus, if, as we submit, the cash payments for meals to be consumed off the business premises of respondent's employer do not qualify for exclusion under Section 119 (see Point II, *infra,* pp. 34–43), they must be includable in respondent's gross income.

B. THERE IS NO NON-STATUTORY EXCLUSION FROM GROSS INCOME FOR AN EMPLOYER'S CASH PAYMENTS TO HIS EMPLOYEES FOR THEIR PERSONAL MEALS

1. The Saunders decision erred in extending the "convenience-of-the-employer" rule to cash payments for meals

a. The sole authority cited by the court of appeals in support of its holding that the State's cash meal payments were not includable in respondent's gross income was its prior decision in *Saunders* v. *Commissioner, supra.* There, the court held that a cash allowance for meals paid by the State to its police troopers could be excluded from their gross income because the payments were made for the "convenience of the employer" within the meaning of then-outstanding Regulations 111, Section 29.22(a)–3 (1939 Code). That Regulation provided in part as follows:

> If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished

> constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. * * *

As the court in *Saunders* recognized, the regulation that set forth the convenience-of-the-employer rule "by its terms refer[red] only to living quarters and meals furnished in kind" (215 F. 2d at 771). Nevertheless, the court departed from the literal terms of the Regulation and held that its "rationale" "should make it applicable to determine the extent of gross income either when quarters and meals are furnished in kind or cash is paid in lieu thereof" (*ibid.*).

To begin with, the court's implicit assumption that cash payments for meals were excludable from income simply because the meals would have been excludable had they been provided in kind cannot stand in the face of this Court's admonition that "[t]ax consequences follow what has taken place, not what might have taken place." *Central Tablet Mfg. Co.* v. *United States,* 417 U.S. 673, 690; *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134, 148–149, and cases cited therein.

Moreover, the policy underlying the pre-1954 Code convenience-of-the-employer rule would not have been served by treating cash payments to defray the cost of meals as equivalent to meals provided in kind. The terms of the Regulation make it clear that the policy of the rule was to permit an employee to exclude the

value of meals furnished to him in prescribed locations by his employer where the purpose of the employer was to enable the employee to perform his duties more efficiently. But extending the exclusion to an employer's unrestricted cash payments to defray the cost of his employees' personal expenses for meals would not have served the "convenience of the employer" any more than any other type of compensation. Such cash payments for personal expenses simply confer upon the employee monetary consideration for services performed that are "undeniable accessions to wealth, clearly realized, and over which the * * * [employee has] complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra,* 348 U.S. at 431.

The court in *Saunders* acknowledged that cash payments to an employer were qualitatively different from meals or lodging in kind. It stated that "[a]dmittedly, the payment of cash to an employee is normally compensatory and probably more obviously so than a payment in kind" (215 F. 2d at 771). However, the court went on to hold that where an employee is furnished cash for a particular purpose, such as for meals, and the entire amount is so expended, then the cash is not taxable compensation.

To be sure, cash payments by an employer to his employee to enable the employee to perform his official duties, such as travel, are not includable in the employee's gross income (see p. 25, *infra*). But there is nothing in the statutory definition of "gross income" that indicates that cash payments by an

employer that are intended to defray the cost of his employee's personal living expenses are not compensation for services. Like wages or commissions, such additional payments are part of the employer-employee relationship and are designed to reward the employee for services performed and to enlist more efficient service from him in the future. As this Court stated in *Commissioner* v. *LoBue, supra,* 351 U.S. at 247, "[w]hen assets are transferred by an employer to an employee to secure better services they are plainly compensation." Accord: *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 720–730.

b. In extending the convenience-of-the-employer rule to cash payments for meals, the court in *Saunders* strongly relied upon *Jones* v. *United States,* 60 Ct. Cl. 552. There, the Court of Claims held that an Army officer's gross income did not include either the value of living quarters or a cash allowance furnished to him in lieu of quarters. But the rationale of the *Jones* decision dealing with the particularized case of the uniformed military services cannot be extrapolated to a non-statutory exclusion for cash allowances for meals to policemen.[9]

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[9] See *Magness* v. *Commissioner,* 247 F. 2d 740 (C.A. 5), certiorari denied, 355 U.S. 931. In refusing to extend the *Jones* decision to state police troopers, the court stated as follows (*id.* at 744): "* * * the Jones case presented the peculiar situation wherein the United States, with one hand, as an employer, gives money to its employees, and with the other hand, as a tax collector, takes it back; whereas a state is in the same position as any other employer so far as the federal income tax obligations of its employees are concerned."

As a result of the *Jones* decision, the then Bureau of Internal Revenue revoked its position that cash subsistence payments to military personnel are includable in gross income (see I.T. 1965, III–1 Cum. Bull. 201) and ruled that such allowances in lieu of subsistence and quarters are not income subject to federal income tax. See I.T. 2219, IV–2 Cum. Bull. 41. See also Mim. 3413, V–1 Cum. Bull. 29. The exclusion for military housing allowances was ultimately incorporated in the Treasury Regulations under the Revenue Acts of 1926, and the 1939 and 1954 Codes. See, *e.g.*, Regulations 69, Article 33; Regulations 77, Article 53; Regulations 111, Section 29.22(a)–3; Treasury Regulations, Section 1.61–2(b) (26 C.F.R.).

But contrary to respondent's argument (Br. in Opp. 10), the Regulations providing tax-free privileges for the uniformed services of the United States do not demonstrate the existence of a generalized non-statutory exclusion for cash meal allowances to civilian taxpayers, such as state police troopers, whose functions might be loosely analogized to the armed services.[10] Indeed, the administrative history makes precisely the same point. For the almost immediate acceptance by the Treasury of the *Jones* decision more than 50 years ago and its continued incorporation

[10] See *Van Rosen* v. *Commissioner*, 17 T.C. 834, where the Tax Court held in a unanimous reviewed decision that the *Jones* rationale was not applicable to a cash subsistence and quarters allowance to a civilian employee of the Army Transportation Corps. See also Rev. Rul. 60–66, 1960–1 Cum. Bull. 21 (cash subsistence and quarters allowance paid by the Department of the Army to a civilian contract surgeon held to be taxable income).

into the Regulations since the Revenue Act of 1926 brings this case within the settled principle that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Helvering* v. *Winmill,* 305 U.S. 79, 83 (footnote omitted). Accord: *United States* v. *Correll,* 389 U.S. 299, 305–306; *Fribourg Navigation Co.* v. *Commissioner,* 383 U.S. 272, 283.

If any further evidence is required that "Congress traditionally has provided a special system of tax-free allowances for military personnel" (*Commissioner* v. *Stidger,* 386 U.S. 287, 294), it can be found in 37 U.S.C. (Supp. V) 101(25), where Congress explicitly confirmed its prior understanding that "regular military compensation" includes the "Federal tax advantages accruing to the aforementioned [quarters and subsistence] allowances because they are not subject to Federal income tax."[11] There is accordingly no

[11] The exclusion currently applies to subsistence and uniform allowances, and amounts received as commutation of quarters by members of the "Armed Forces, Coast and Geodetic Survey and Public Health Service of the United States." Treasury Regulations, Section 1.61–2(b). While respondent states (Br. in Opp. 10) that it is "significant" that the exclusion extends to the Public Health Service, even though it is not part of the military, the Public Health Service is one of the "uniformed services," as that term is defined by 37 U.S.C. 101(3). Thus, in implementing the *Jones* decision, the Treasury determined to treat all of the "uniformed services" in a consistent manner. Compare O.D. 1098, 5 Cum. Bull. 85, with I.T. 2232, IV–2 Cum. Bull. 144.

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basis to respondent's contention that the tax-free allowances to the military demonstrate the existence of a non-statutory exclusion for an employer's cash payments to defray the cost of his employees' personal expense for meals.[12]

2. The legislative history of Sections 119 and 120 of the 1954 Code establish that the Saunders decision does not survive the enactment of the 1954 Code

The legislative history of Sections 119 and 120 of the 1954 Code confirms the correctness of the Tax

[12] Apart from the military allowances, the only exception to the general principle that an employer's cash payments to defray the cost of his employees' personal and nondeductible expenses for meals are includable in the employees' gross income is O.D. 514, 2 Cum. Bull. 90. There, the then Bureau of Internal Revenue ruled in 1920 that "supper money" paid by an employer to an employee, who voluntarily performs extra labor for his employer after regular business hours, is considered to be paid for the convenience of the employer and is not taxable income to the employee.

On its facts, the ruling is readily distinguishable from this case, where respondent received a regular cash allowance for meals for each day he was on active duty, pursuant to a contractual obligation of his employer. Thus, respondent cannot contend that he relied on this "supper money" ruling in support of his claimed exclusion. But quite apart from the factual distinctions between the ruling and this case, O.D. 514 does not reflect the exposition of a technical statutory position that would permit the exclusion of all meal allowances. Instead, the ruling reflects a limited exclusion resulting from the exercise of the Commissioner's administrative discretion in deciding not to require inclusion in income of benefits that are infrequently conferred, difficult to ascertain, and of relatively insignificant value. See, *e.g.*, Rev. Rul. 59–58, 1959–1 Cum. Bull. 17, holding that the value of small items of merchandise purchased by an employer and distributed generally to each of his employees at Christmas or a comparable holiday is not includable in income. See also Pet. App. A 17A–18A, n. 5.

Court's conclusion (Pet. App. A 9A–19A) that the *Saunders* decision did not survive the enactment of the 1954 Code.[13] These provisions independently demonstrate that there is no non-statutory exclusion for cash payments by an employer to defray the cost of personal meals of a civilian employee.

a. Section 119, Appendix, *infra,* pp. 1A–2A, provides an exclusion from an employee's gross income for the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if the meals or lodging are furnished on the business premises of the employer, and the lodging is furnished as a condition of employment. The pertinent Senate Committee Report on this provision observed that "[e]xisting law, as currently interpreted by the Internal Revenue Service and certain court decisions, requires that if meals or lodging represent compensation the value thereof must be included in gross income even though the employee must accept such meals or lodging in order properly to perform his duties." S. Rep. No. 1622, 83d Cong., 2d Sess. 190 (1954). Hence, in order to avoid the necessity of making a factual determination in each case whether meals or lodging were compensation, Congress established an exclusion for "the value of meals or lodging furnished to * * * [an employee] for the convenience of his employer whether or not

[13] Hence, the Tax Court did not consider itself bound to follow *Saunders* as the rule of the circuit to which the case would be appealed. See *Golsen* v. *Commissioner*, 54 T.C. 742, 756–758, affirmed, 445 F. 2d 985 (C.A. 10), certiorari denied, 404 U.S. 940.

such meals or lodging are furnished as compensation. In the case of meals the exclusion is permitted only if the meals are furnished on the business premises of the employer. In the case of lodging the exclusion is permitted only if the employee is required to accept the lodging on the business premises of the employer as a condition of his employment" (*ibid.*).

Plainly, the origin of the statutory exclusion of Section 119 of the 1954 Code is the "convenience-of-the-employer" rule of Regulations 111, Section 29.22 (a)–3 under the 1939 Code. But unlike the earlier version of the exclusion, which turned solely on the generally undefined standard of whether living quarters or meals were furnished for the convenience of the employer, the 1954 Code introduced the requirements that the lodging or meals be provided on the business premises of the employer and that the employee accept the lodging as a condition of his employment. Moreover, in considering whether lodging or meals were furnished for the convenience of the employer, Section 119 provides that "the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative * * *."[14] Finally, and most significantly for present purposes, both the Senate and House Reports state that "Section 119 applies only to meals or lodging furnished in kind." S. Rep. No. 1622, 83d Cong., 2d Sess. 190 (1954). See also H.R. Rep. No. 1337, 83d

[14] Thus, Congress explicitly rejected one of the bases of the *Saunders* decision that was to be rendered one month after the 1954 codification, *viz.*, that the intent and practice of the State authorities was relevant in deciding whether quarters or meals represented compensation (see 215 F. 2d at 774). Contractual labels are not binding in determining the federal tax consequences of a

Cong., 2d Sess. A39 (1954). Accord: Treasury Regulations, Section 1.119–1(c)(2).

The legislative history of Section 119 shows that Congress intended to limit the application of the former "convenience-of-the-employer" rule to meals and lodging furnished in kind. The extension of the rule to cash allowances for meals created by the Third Circuit in *Saunders* therefore did not survive the 1954 Code. Indeed, if the non-statutory exclusion of *Saunders* were still a valid gloss upon the broad statutory definition of gross income, it would not have been necessary for Congress in 1954 to establish detailed rules limiting the exclusion to meals and lodging provided in kind on the business premises of the employer. Thus, under the 1954 Code, cash allowances by an employer to defray the cost of his employees' personal meals of the type at issue here cannot be excluded from gross income on the ground that they are for the "convenience of the employer."

Contrary to respondent's argument (Br. in Opp. 10–13) and that of the Tax Court minority (Pet. App. A 32A–37A), the references to cash allowances in the legislative history of Section 119 do not support the continued validity of the *Saunders* decision

transaction, including an employer-employee relationship. See, *e.g.*, *Bartels* v. *Birmingham*, 332 U.S. 126, 128–129; *Commissioner* v. *Tower*, 327 U.S. 280, 287, 288; *United States* v. *Pelzer*, 312 U.S. 399, 402–403; *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U.S. 110, 114. Indeed, in *Diamond* v. *Sturr*, 221 F. 2d 264 (C.A. 2), the court held that state labels would not control in determining whether food and lodging furnished to employees of the State were includable in gross income under the pre-1954 non-statutory "convenience-of-the-employer" rule. See also *Staunton Industrial Loan Corp.* v. *Commissioner*, 120 F. 2d 930, 933 (C.A. 4).

under the 1954 Code. After noting that Section 119 was to apply only to meals or lodging furnished in kind, the House Committee Report stated: "Therefore, any cash allowances for meals or lodging received by an employee will continue to be includable in gross income, as under existing law, to the extent that such allowances represent compensation." H.R. Rep. No. 1337, *supra,* at A39."

But this statement must be viewed against the background of the case law as it existed at the time of the enactment of the 1954 Code. Apart from the exclusion for cash allowances to the military upheld by the Court of Claims in *Jones,* the decisions had uniformly refused to extend the "convenience-of-the-employer" rule to cash payments for personal meals. See *Van Rosen* v. *Commissioner,* 17 T.C. 834 (*Jones* not applicable to cash allowance to civilian employee of the Army Transportation Corps); *Hyslope* v. *Commissioner,* 21 T.C. 131 (cash meal allowance to state police trooper held to be income); *Saunders* v. *Commissioner,* 21 T.C. 630 (same). Cf. *Benaglia* v. *Commissioner,* 36 B.T.A. 838 (meals and lodging furnished in kind held to be excluded from income). Given the explicit congressional approval of this body of "existing law," there is no basis to respondent's argument (Br. in Opp. 10–11) that Section 119

[13] The statement in the Senate Committee Report is identical except that it omits the phrase "as under existing law." See S. Rep. No. 1622, *supra,* at 190–191.

created a "safe harbor" for meals in kind and that cash allowances could continue to qualify for exclusion under the prior "convenience-of-the-employer" rule.

Moreover, the qualifying statement in the legislative history of Section 119 that cash allowances for meals or lodging will be includable in income "to the extent that * * * [they] represent compensation" does not support respondent's assertion (Br. in Opp. 11) that the "convenience-of-the-employer" rule survived the enactment of the 1954 Code and extends to cash payments for meals. Given the limitation of the Section 119 exclusion to meals and lodging in kind, the quoted statement refers to those instances when an employer makes cash advances to his employee to enable him to obtain meals or lodging in the course of official travel or to incur such expenses solely for the benefit of his employer. While such activities may require the employee to purchase lodging and meals, the payments are not includable in the employee's gross income if he is required to submit an accounting to his employer. See Treasury Regulations, Sections 1.162–17(b), 1.162–17(c), 1.274–5(e).

In those circumstances, the cash allowances do not "represent compensation" to the employee because they are in furtherance of the employer's business. There is accordingly no support in the legislative history of Section 119 for inferring that Con-

gress intended to exclude such payments from the statutory definition of gross income.

b. The legislative history of the short-lived Section 120 of the 1954 Code also shows that there is no post-1954 non-statutory exclusion for cash payments by an employer to defray the cost of personal meals of a civilian employee. Section 120 provided an exclusion up to $5 per day for statutory subsistence allowances received by state and local police officials. In reporting out this provision, the House Ways and Means Committee stated: "There is no comparable exclusion under existing law. Your committee believes that this exclusion is desirable because State police officers are required to make frequent trips away from their posts of duty. Under present law these expenses cannot be deducted if the police officer is to use the standard deduction." H.R. Rep. No. 1337, *supra,* at 18. See also S. Rep. No. 1622, *supra,* at 19–20.

The enactment of Section 120 underscores the error of the court of appeals' adherence to its prior decision in *Saunders* which extended the convenience-of-the-employer rule to cash meal allowances. For if there was a non-statutory exclusion for such cash payments, there would have been no need for Congress to add Section 120 on the ground that "[t]here * * * [was] no comparable exclusion under existing law."

While the Third Circuit in *Saunders* was aware of the legislative history of Section 120, it refused to accord it authoritative weight with respect to the tax

year 1950 on the ground that later statutes may not be used as an aid in the interpretation of earlier acts (see 215 F. 2d at 775). But whatever the merits of this aspect of the *Saunders* decision, it has no application to the post-1954 year involved in this case.[16] The statement of Congress in 1954 that there was no exclusion for cash subsistence allowances for police officials reflects the legislative understanding that such payments were within the statutory definition of gross income.[17]

C. EVEN IF THE NON-STATUTORY "CONVENIENCE-OF-THE-EMPLOYER" RULE SURVIVES THE ENACTMENT OF THE 1954 CODE, THE CASH MEAL ALLOWANCES RECEIVED BY RESPONDENT ARE INCLUDABLE IN HIS GROSS INCOME BECAUSE THEY WERE COMPENSATORY AND NOT PAID FOR THE CONVENIENCE OF THE EMPLOYER

In the foregoing portion of this brief, we have shown that there is no non-statutory exclusion from gross income for an employer's cash payments to defray the cost of his employees' personal meals, and that the Third Circuit in *Saunders* erred in creating such an exclusion. At all events, the non-statutory

[16] The court in *Saunders* also stated that the legislative history of Section 120 "indicates that the proposed exclusion is intended to afford relief to policemen such as Hyslope [21 T.C. 131] whose allowance has been determined to be compensation but it is not necessarily an indication that the allowances of all policemen are compensatory" (215 F. 2d at 775). However, as we pointed out *supra*, p. 25, the only type of noncompensatory cash allowance would be an advance to the employee to incur expenses in furtherance of the employer's business. Thus, payments to defray the cost of an employee's personal meals would always be compensation.

[17] The repeal of Section 120 in 1958 shows that Congress intended to exclude cash allowance from the coverage of Section 119. See Point II, *infra*, pp. 38–39.

"convenience-of-the-employer" rule did not survive the enactment of Section 119 of the 1954 Code, which is now the exclusive provision dealing with meals or lodging furnished for the convenience of the employer. But even if respondent is correct in asserting (Br. in Opp. 11–14) that a non-statutory convenience-of-the-employer rule continues to exist after the 1954 codification and that such a rule excludes from gross income cash meal allowances that are (1) noncompensatory, and (2) paid for the convenience of the employer, the meal payments at issue in this case would not qualify for exclusion because they met neither condition.

1. The payments were compensatory

As this Court held almost 50 years ago in *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 729–730, it is a fundamental principle of our tax law that reimbursement or payment of an employee's non-deductible personal expenses by his employer represents taxable compensation to the employee. Here, there is no suggestion that the meal allowance was a non-taxable gift (see Section 102; *Commissioner* v. *Jacobson*, 336 U.S. 28, 47–52). The unrestricted cash payments to the state police troopers such as respondent were taxable compensation because they were intended to reimburse the troopers for the cost of their personal non-deductible expenses for meals.

As the Tax Court correctly observed, the meal allowance "was obviously compensatory to a trooper to

the extent that it paid for food which he otherwise would have had to pay for from some other source" (Pet. App. A 13A). In this respect, the allowance is on the same footing as a payment for the school tuition of a trooper's children, the rent on his personal residence, his grocery or utility bills, or for his commuting expenses. Since payments for such items confer a personal benefit upon the employee in exchange for the performance of his personal services, they are undisputably part of the employee's compensation. See *United States* v. *Woodall*, 255 F. 2d 370, 372 (C.A. 10), certiorari denied, 358 U.S. 824.

Moreover, the meal allowance paid to respondent had all of the characteristics of compensation. On a police recruitment brochure, the State describes the meal allowance as an item to be received in addition to the base salary. In addition, the meal allowance is included in the compensation base upon which the pension benefits of the state policemen are computed.[18] Surely the State would not pay retirement annuities based upon the meal allowances if they were not compensatory. Cf. *Commissioner* v. *Wolfe*, 361 F. 2d 62, 66 (C.A.D.C.), certiorari denied, 385 U.S. 838. The meal allowance is also a subject of negotiations between the State and the troopers' union (Pet. App.

[18] The retirement allowance is equal to 50 percent of the policeman's "final compensation" plus one percent of his final compensation multiplied by the number of years of service which exceeds 25 years. See N.J. Stat. Ann. 53:5A-8 (1977 Supp.). The term "final compensation" is defined to include the value of the policeman's maintenance allowance. See N.J. Stat. Ann. 53:5A-3i (1977 Supp.).

A 5A). Thus, the payments "represented part of the benefit package which was negotiated as part of the wage structure under the collective bargaining agreement in effect between the * * * [State] and the union representative of the * * * [police troopers]." *Educational Fund of the Electrical Industry* v. *United States,* 426 F. 2d 1053, 1056 (C.A. 2).

Finally, any remaining doubt as to the compensatory nature of the meal allowances is dispelled by the fact that the amount of the allowance was a function of the rank of the recipient. Thus, for example, while respondent and the other police troopers and non-commissioned officers were entitled to an annual allowance of $1,740 for the year at issue, lieutenants and captains received $1,776, majors received $1,848, and the superintendent colonel received $2,136 (A. 24). The direct proportional relationship of the amount of the allowance to rank is inconsistent with the notion that these unrestricted cash payments are noncompensatory substitutions for a standardized on-duty meal in kind.

Respondent will undoubtedly continue to rely (see Br. in Opp. 14) upon the statement in the Tax Court's findings that "[t]he meal allowance was not intended to represent additional compensation" (Pet. App. A 5A). But as the Tax Court correctly recognized in determining whether benefits conferred upon an employee are compensatory, it is the objective circumstances of the arrangement and not the intention

of the employer that are controlling.[19] Thus, the Tax Court later observed in its opinion that "[e]ven though we have found that the meal allowance was not intended as additional compensation, it was obviously compensatory to a trooper to the extent it paid for food which he otherwise would have had to pay for from some other source" (Pet. App. A 12A–13A).

It is this conferring of a personal benefit upon the employee as part of the employer-employee relationship that makes the payment compensatory. The fact that the meal allowance is not paid in exchange for the performance of a particular service does not render it noncompensatory. As the Court stated in *Social Security Board* v. *Nierotko,* 327 U.S. 358, 365–366 (footnote omitted), in referring to the consideration for which compensation is paid, the term "service" means "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer."

Thus, for example, if an employee is required to eat his noon meal in a manner which enables him to return to work within a prescribed period of time, his employer's reimbursement of expenses incurred for that meal is nevertheless part of his taxable compensation. The statutory definition of gross income "is broad enough to include in taxable income any economic or financial benefit conferred on the employee

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[19] As this Court observed in *Commissioner* v. *Duberstein,* 363 U.S. 278, 286, "the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter." See also pp. 22–23, n. 14, *supra.*

as compensation, whatever the form or mode by which it is effected." *Commissioner* v. *Smith,* 324 U.S. 177, 181.

2. The payments were not for the convenience of the employer

In support of his argument that the cash meal allowances were paid for the convenience of the employer, respondent cites (Br. in Opp. 14) the Tax Court's statement that "[the meal allowance] system was adopted to provide the State and the public with better police protection" (Pet. App. A 5A). In so contending, respondent appears to rely upon the State's requirements that if the trooper chooses to eat his meal at a public restaurant, he must do so within his assigned patrol area, that he first check in with the officer in charge and request permission to eat, and that he advise the officer where he may be reached while eating so that he may be subject to call during the eating period (Pet. App. A 5A).

We do not quarrel with respondent's implied assertion that the imposition of these rules is for the convenience of the employer. But the critical question is not whether the restrictions on the troopers' meal periods is for the convenience of the employer but whether the payment of the cash allowances is to be so regarded.

There is no necessary connection between the meal restrictions and the State's decision to make cash payments. Indeed, the majority of working people are subject to similar restrictions as to when and for what length of time they can be absent from their assigned

duty station for the purpose of obtaining a mid-shift meal. In this respect, the troopers' situation is not qualitatively different from that of most other employees. Nevertheless, few employers make cash payments as meal allowances.

Thus, the State's decision to pay the allowances was not compelled by the need to fix the period within which the troopers could take their meals or to limit such activity to their patrol area.[20] The only purpose served by the cash payments was to make the troopers more content with the conditions of their employment by providing them with additional compensation. But for the "meal-allowance" label, the same result could have been achieved by increasing the troopers' annual salary by $1,740. Indeed, as a practical matter that was precisely what the cash meal allowances did.

In sum, even if there is a non-statutory "convenience-of-the-employer" rule that survives the enactment of the 1954 Code, the meal allowances at issue would not qualify for exclusion because they were compensatory and not for the convenience of the employer. Thus, absent the applicability of a specific statutory exclusion, they are fully includable in gross

[20] That the meal allowances were unrelated to the restrictions designed to provide the public with better police protection is further shown by the fact that the payments were made to all police officials regardless of the nature of their duty. For example, respondent continued to receive the allowance during the May 7–June 28, 1970 period when he was engaged in screening prospective recruits (see Pet. App. A 7A). It would seem that the State would have had little interest in controlling the location or time of his meals during this non-patrol assignment.

income within the meaning of Section 61(a). Since the only possibly applicable statutory exclusion is Section 119, we turn now to show why respondent did not meet the conditions of that provision.

II

AN EMPLOYER'S CASH PAYMENTS TO HIS EMPLOYEES TO DEFRAY THE COST OF THEIR PERSONAL EXPENSES FOR MEALS ARE NOT EXCLUDABLE FROM THE EMPLOYEES' GROSS INCOME UNDER SECTION 119 OF THE INTERNAL REVENUE CODE

The court of appeals' holding that the cash payments designated as meal allowances by the State are excludable under Section 119 is likewise erroneous. As we have shown *supra,* pp. 21–23, Section 119 permits the exclusion from an employee's gross income of "the value of any meals * * * furnished to him by his employer for the convenience of the employer, but only if—(1) in the case of meals, the meals are furnished on the business premises of the employer * * *." There are three requirements for qualification under this provision: (1) the meals must be furnished for the convenience of the employer; (2) the meals must be furnished in kind; and (3) the meals must be furnished on the business premises of the employer. The meal allowances at issue here do not meet any of those requirements. Since the statute provides that meals or lodging must meet all three requirements in order to be eligible for the exclusion, the failure of the payments at issue to qualify under

any one of the three statutory criteria would render the cash allowances includable in respondent's income.

A. THE CASH PAYMENTS WERE NOT MADE FOR THE CONVENIENCE OF THE EMPLOYER

The first requirement of Section 119—that the meals be furnished for the convenience of the employer—has its origin in the non-statutory rule under the 1939 Code. But as we have established in Point I. C. 2, *supra,* pp. 32–34, the cash payments at issue in this case were not made for the convenience of the employer, because they were entirely unrelated to the restrictions imposed by the State with respect to the time and place of the police troopers' meals.

These restrictions may have enhanced the convenience of the State to provide better police protection. However, the critical fact is that the State could have imposed such restrictions upon the troopers without paying them the cash allowances. The cash allowances were purely compensatory and were not made for the convenience of the employer.

The facts of this case illustrate the correctness of the general proposition that an employer's cash payments to defray the cost of his employee's personal meals can never meet the "convenience-of-the-employer" standard. While meals in kind furnished on the business premises of the employer keep the employees close to their assigned work place and promote greater efficiency and thereby serve the "convenience of the employer," cash meal allowances simply enrich the employee and do not of themselves im-

pose any controls for the benefit of the employer. Here, for example, the troopers presumably would have eaten in the same restaurants at the same times and for periods of the same duration, whether or not they received a cash allowance.

B. SECTION 119 APPLIES ONLY TO ACTUAL MEALS FURNISHED IN KIND AND NOT TO CASH ALLOWANCES

1. In enacting the exclusion in the 1954 Code for employer-provided meals, both the House and Senate Reports stated that "[s]ection 119 applies only to meals or lodging furnished in kind." S. Rep. No. 1622, *supra,* at 190; H.R. Rep. No. 1337, *supra,* at A39; accord: Treasury Regulations, Section 1.119–1(c)(2), Appendix, *infra,* p. 4A. By limiting the exclusion to actual meals furnished in kind, Section 119 insured that cash allowances would not be used as a disguised form of additional compensation.[21] Thus, the statute speaks of "the *value* of any meals * * * *furnished* * * * by his employer" (emphasis added) to implement the congressional intention to limit the exclusion to meals in kind. The statutory exclusion does not encompass cash allowances for meals purchased by the employee from a third party. As the First Circuit succinctly put it in *Wilson* v. *United States, supra,* 412 F. 2d at 696 (footnote omitted): "What

[21] Significantly, the Senate retained the "in kind" requirement in the statute (see Hearings on H.R. 8300 (Internal Revenue Code of 1954) before the Senate Committee on Finance, 83d Cong., 2d Sess. 485 (1954)) even though the American Bar Association Section of Taxation had recommended its deletion (as well as deletion of the "business premises" requirement) in favor of the general

the statute speaks of as furnished is the meals, not the cost; furnishing means supplying, or serving, not paying. Indeed, 'cost' is not even referred to, but 'value,' a word more consistent with appraisal than monetary payment." Accord: *Ghastin* v. *Commissioner,* 60 T.C. 264.

This reading of Section 119 is confirmed by other provisions in the Internal Revenue Code. The Code uses the term "value" to refer to a transfer of property other than money (see, *e.g.,* Sections 351(b)(1), 356(a)(1)(B), 358(a)(2), and 1001(b)). However, when Congress intends to cover both the transfer of cash and of other types of property, it uses language other than "value" to designate cash transfers.

For example, Section 107, which provides for an exclusion for the clergy for the "[r]ental value of parsonages," speaks of "(1) the rental *value* of a home furnished to him as part of his compensation, or (2) the rental *allowance* paid to him as part of his compensation, to the extent used by him to rent or provide a home" (emphasis added).[22] In constrast, the predecessor of Section 107 (Section 22(b)(6) of the 1939 Code) provided an exclusion only for the rental

"convenience-of-the-employer" rule. The Bar Association has urged that the exclusion not be limited to employees whose employers had facilities for providing meals and lodging, such as "restaurant, hospital, hotel, and domestic employees." Congress was therefore fully aware of the limitations of the "in kind" and "business premises" requirements.

[22] See also Section 117, which provides an exclusion for scholarship and fellowships and applies to both "amounts received" and "the value of [contributed] services and accommodations."

value of an actual home furnished to members of the clergy. When Congress extended the exclusion to cash rental allowances in 1954, it explained the statutory change as follows (H.R. Rep. No. 1337, *supra,* at A35):

> The first paragraph of this section is derived from section 22(b)(6) of the 1939 Code. No substantive change is made.
>
> The second paragraph provides that the allowance paid to a minister of the gospel as part of his compensation (to the extent used by him to rent or provide a home) is not a part of his gross income. Thus, a minister who receives a rental allowance in lieu of the use of a home will be able to exclude this allowance if it is used to rent or provide a home.

The congressional intention to exclude cash allowances from the coverage of Section 119 is further demonstrated by the enactment of Section 120 in 1954 and its repeal in 1958. As we have described *supra,* pp. 26–27, that latter provsion permitted police officers to exclude from income cash subsistence allowances not in excess of $5 per day. If Congress believed that cash allowances to police officers were excludable under Section 119, it would not have been necessary to add Section 120 to the Code.

After the enactment of Section 120, the state governments began to designate portions of police salaries as subsistence allowances in order to permit the officers to take advantage of the $5 per day exclusion. See *United States* v. *Shirah,* 253 F. 2d 798 (C.A. 4). In order to eliminate this abuse, Congress repealed Section 120 by Section 3, Technical Amendments Act

of 1958, Pub. L. 85–866, 72 Stat. 1606, and explained (H.R. Rep. No. 775, 85th Cong., 1st Sess. 7 (1957)) that—

> this exclusion is inequitable since there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Thus, it appears that certain police officials by reason of this exclusion are placed in a more favorable position taxwise than other individual income taxpayers who incur the same types of expense. * * *
>
> Therefore, to bring the tax treatment of subsistence allowances for police officials into line with the treatment of such allowances in the case of other taxpayers, your committee's bill repeals section 120 of present law which provides this special allowance. * * *

If, as the decision below holds, cash payments are excludable under Section 119, the repeal of Section 120 would be rendered ineffective and the inequity that Congress believed it had eliminated between police officials and other employees would be perpetuated. The extension of Section 119 to cash allowances would frustrate the clearly stated intention of Congress.

2. The four courts of appeals that have held that cash meal allowances to police troopers are excludable under Section 119 have failed to give effect to the statutory requirement that the meals be furnished in kind. In *United States* v. *Barrett,* 321 F. 2d 911 (C.A. 5), the first appellate decision to consider the question whether Section 119 applied to cash meal allow-

ances, the court did not refer either to the legislative history or the Regulations limiting the exclusion to meals furnished in kind. Instead, it relied upon *Saunders,* despite the fact that the Third Circuit's earlier decision in *Saunders* did not address the applicability of Section 119 because it involved a tax year prior to the enactment of that provision.[23]

In the second appellate decision, *United States* v. *Morelan,* 356 F. 2d 199 (C.A. 8), the court was aware of the statements in the legislative history limiting the exclusion of Section 119 to meals furnished in kind. But the court read the legislative history to mean "that only cash allowances which 'compensate'—i.e., reward or benefit rather than reimburse—are includable in gross income" (356 F. 2d at 204).

As we explained *supra,* pp. 23–26, the committee reports confirm that in enacting Section 119, Congress did not intend to alter the law with respect to cash allowances so that such payments for meals received by an employee would continue to be includable in gross income to the extent that they represented compensation. But that is a far cry from the Eighth Circuit's conclusion that Section 119 excludes noncompensatory cash payments for meals from gross income. What the committee reports stated is that *no* cash payments—either compensatory or noncompensatory—were to be covered by Section 119, but that

[23] The Fifth Circuit recently reaffirmed its *Barrett* decision in *Smith* v. *United States*, 543 F. 2d 1155, petition for a writ of certiorari pending, No. 76-1243.

noncompensatory payments would be excludable under the prior law.

At all events, an employer's cash payments to defray the cost of his employees' personal meal expenses are inherently compensatory (see pp. 28–32, *supra*).[24] There is accordingly no basis for the Eighth Circuit's exclusion of such payments under Section 119 or otherwise.[25]

C. THE TROOPERS' MEALS WERE NOT FURNISHED ON THE BUSINESS PREMISES OF THE EMPLOYER

The third requirement for qualification for exclusion under Section 119 is that the meals must be "furnished on the business premises of the employer." Thus, even if the cash allowances were the equivalent of meals in kind, they are not excludable from respondent's gross income because the public eating places at which he consumed his mid-shift meals were not the business premises of the employer.

In defining the statutory phrase "business premises of the employer," Treasury Regulations, Section 1.119–1(c)(1) provides that the term generally means the place of the employment of the employee. Thus,

[24] While the Eighth Circuit in *Morelan* characterized the record in that case as establishing that the cash meal allowances were noncompensatory (see 356 F. 2d at 204), it did not specify either the evidentiary basis or the legal standard for that aspect of its decision.

[25] Like the decision below, the Tenth Circuit in *United States* v. *Keeton*, 383 F. 2d 429, did not attempt any independent analysis of the statutory requirement that the meals be furnished in kind. Instead, it simply expressed agreement with *Barrett* and *Morelan* (see 383 F. 2d at 430).

meals furnished in the home where a domestic servant performed his duties or on the grazing lands where cowhands herded their employer's cattle would be regarded as furnished on the business premises of the employer. But public eating places or an employee's own home are, under no stretch of the imagination, the business premises of the employer.

"The term 'business premises' is one of 'great specificity'" (*Wilson* v. *United States, supra,* 412 F. 2d at 696) and cannot be loosely construed as any place where an employee might conveniently eat his lunch. As Judge Raum observed in *Dole* v. *Commissioner,* 43 T.C. 697, 708, affirmed *per curiam,* 351 F. 2d 308 (C.A. 1), "[t]he statute does not say 'at some convenient or reasonably accessible place * * *.' It says 'on the business premises' of the employer." Since the State did not conduct any business in the public restaurants or the homes in which respondent and his fellow troopers ate their mid-shift meals, these locations were not "the business premises of the employer." Accord: *Koerner* v. *United States, supra.*

Contrary to the *Barrett* and *Morelan* decisions, which the court of appeals cited with approval (Pet. App. B 40A), the business premises of a police trooper cannot be deemed to be the entire state or even the area that he patrols (see 321 F. 2d at 912; 356 F. 2d at 203). This broad formulation would frustrate the efforts of Congress to spell out with particularity the conditions for the exclusion of employer-provided meals. Such a broad area is no more the business premises of a police trooper's employer than the assigned "territory" of a traveling salesman would be the business premises of the salesman's employer. In both instances, the term "business premises" must be construed to effectuate the purpose of Congress to limit the exclusion to cases where the employee consumes his meal at his assigned duty station so as to serve the convenience of the employer, and not at any location within a wide geographical area. As the Sixth Circuit stated in *Commissioner* v. *Anderson,* 371 F. 2d 59, 67, certiorari denied, 387 U.S. 906:

> When Congress drew this line so as to require that the meals be furnished or the lodging be provided "*on* the business premises of the employer," it is not the proper function of a court to disregard that line and substitute a line of its own choosing. [Emphasis in original.]

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

* * * * *

SEC. 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.119-1 *Meals and lodging furnished for the convenience of the employer.*

(a) *Meals*—(1) *In general.* The value of meals furnished to an employee by his employer shall be excluded from the employee's gross income if two tests are met: (i) The meals are furnished on the business premises of the employer, and (ii) the meals are furnished for the convenience of the employer. The question of whether meals are furnished for the convenience of the employer is one of fact to be determined by analysis of all the facts and circumstances in each case. If the tests described in subdivisions (i) and (ii) of this subparagraph are met, the exclusion shall apply irrespective of whether under an employment contract or a statute fixing the terms of employment such meals are furnished as compensation.

(2) *Meals furnished without a charge.* (i) Meals furnished by an employer without charge to the employee will be regarded as furnished for the convenience of the employer if such meals are furnished for a substantial noncompensatory business reason of the employer. If an employer furnishes meals as a means of providing additional compensation to his employee (and not for

a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer. Conversely, if the employer furnishes meals to his employee for a substantial noncompensatory business reason, the meals so furnished will be regarded as furnished for the convenience of the employer, even though such meals are also furnished for a compensatory reason. * * *

(ii) (*a*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours to have the employee available for emergency call during his meal period. In order to demonstrate that meals are furnished to the employee to have the employee available for emergency call during the meal period, it must be shown that emergencies have actually occurred, or can reasonably be expected to occur, in the employer's business which have resulted, or will result, in the employer calling on the employee to perform his job during his meal period.

* * * * *

(*c*) Meals will be regarded as furnished for a substantial noncompensatory business reason of the employer when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period. For example, meals may qualify under this subdivision (*c*) when there are insufficient eating facilities in the vicinity of the employer's premises.

* * * * *

(iii) Meals will be regarded as furnished for a compensatory business reason of the employer when the meals are furnished to the employee to promote the morale or goodwill of the employee, or to attract prospective employees.

* * * * *

(c) *Rules.* (1) For purposes of this section, the term "business premises of the employer" generally means the place of employment of the employee. For example, meals and lodging furnished in the employer's home to a domestic servant would constitute meals and lodging furnished on the business premises of the employer. Similarly, meals furnished to cowhands while herding their employer's cattle on leased land would be regarded as furnished on the business premises of the employer.

(2) The exclusion provided by section 119 applies only to meals and lodging furnished in kind by an employer to his employee. If the employee has an option to receive additional compensation in lieu of meals or lodging in kind, the value of such meals and lodging is not excluded from gross income. However, the mere fact that an employee, at his option, may decline to accept meals tendered in kind will not of itself require inclusion of the value thereof in gross income. Cash allowances for meals or lodging received by an employee are includible in gross income to the extent that such allowances constitute compensation.

(d) *Examples.* The provisions of section 119 may be illustrated by the following examples:

* * * * *

Example (5). A Civil Service employee of a State is employed at an institution and is required by his employer to be available for duty at all times. The employer furnishes the employee with meals and lodging at the institution without charge. Under the applicable State statute, his meals and lodging are regarded as part of the employee's compensation. The employee would nevertheless be entitled to exclude the value of such meals and lodging from his gross income.

* * * * *

Example (8). A manufacturing company provides a cafeteria on its premises at which its employees can purchase their lunch. There is no other eating facility located near the company's premises, but the employee can furnish his own meal by bringing his lunch. The amount of compensation which any employee is required to include in gross income is not reduced by the amount charged for the meals, and the meals are not considered to be furnished for the convenience of the employer.

Example (9). A hospital maintains a cafeteria on its premises where all of its 230 employees may obtain a meal during their working hours. No charge is made for these meals. The hospital furnishes such meals in order to have each of 210 of the employees available for any emergencies that may occur, and it is shown that each such employee is at times called upon to perform services during his meal period. Although the hospital does not require such employees to remain on the premises during meal periods, they rarely leave the hospital during their meal period. Since the hospital furnishes meals to each of substantially all of its employees in order to have each of them available for emergency call during his meal period, all of the hospital employees who obtain their meals in the hospital cafeteria may exclude from their gross income the value of such meals.

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